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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

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| UNITED STATES OF AMERICA<br><br>Plaintiff,<br><br>WALKER RIVER PAIUTE TRIBE,<br><br>Plaintiff, Intervenor<br><br>v.<br><br>WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,<br><br>Defendants.<br><br>UNITED STATES OF AMERICA<br>WALKER RIVER PAIUTE TRIBE<br><br>Counterclaimants,<br><br>vs.<br><br>WALKER RIVER IRRIGATION DISTRICT, et al.,<br><br>Counterdefendants. | In Equity No. C-125-ECR<br>Subfile No. C-125-B<br><br>REPLY TO OPPOSITION TO MOTION TO DISQUALIFY COUNSEL, GORDON DePAOLI |

## INTRODUCTION

The Landolts filed a short motion to disqualify Gordon DePaoli and his firm citing the simple proposition that any lawyer who is disabled from giving one client information because he is bound by his duty to another client to keep it secret, has an irremediable conflict of interest. The Landolts, in their moving papers, point out that the *Order Governing Mediation Process* ("*Order*") prohibits, at paragraph 3 thereof, any party to the mediation process from disclosing any confidential information arising from the mediation and that Mr. DePaoli, in addition to representing a party to that mediation, represents a number of party stakeholders who are not. After giving us an exhaustive, but entirely irrelevant, history of the Walker River Irrigation District ("WRID"), setting forth the structure of the allocation of water resources, discussing the progress of the instant litigation and presenting a short primer on water law WRID, at page 21 of it opposition, finally gets to the point. It does not, however, address the central issues raised by the Landolt's motion. Its object appears, rather, to so complicate the discussion that the point of the motion is lost.

## MEDIATION CONFIDENTIALITY

WRID begins its opposition with an interesting parsing of passages designed to leave the inaccurate impression that the non-DePaoli parties are not disadvantaged by their not being represented by DePaoli. It starts by quoting, at length, from the confidentiality section at paragraph 3 of the *Order*, (Opposition, p.18), portentously underlining a reference, contained in paragraph 8.3.1 of the *Order*, to an exception to the confidentiality mandate, as if the reference were something that gave lie to the Landolt's claim that they are prevented from knowing what DePaoli represented clients will know.

The confidentiality section, paragraph 3, is interesting in its structure. It starts out with the unambiguous statement that everything that happens in the mediation is confidential. That, in itself, might have been enough, but the section goes on to emphasize the point by stating that nothing that occurs in the mediation is discoverable at law. And then, as if all of that were not clear enough, it hammers the point home by telling us that not only is none of the mediation material discoverable, one cannot go through the back door with a Freedom of Information Act request to obtain it. Just when you think they might have considered the point made, the paragraph goes on to say that mediation participants are protected from being forced to disclose information from the mediation to any other person or party to the action. And, finally, it says that even if you find out the confidential information, you can't use it at trial because it is inadmissible. Whew!

Ah, but then comes the coup de grace: the portentous 8.3.1 exceptions! These are apparently cited by WRID to show that paragraph 3 really did not mean what it (repeatedly) said and the mediation information is not really all that confidential since it can, in fact, be disclosed. And what is capable of disclosure under 8.3.1? Information that is generally available; previously disclosed information and information that is previously known. That is to say, any information that does not arise from the mediation process. That means, of course, that any information that *does* arise from the mediation process is not available to anyone who did not participate in the mediation. But it is, in fact, available to anyone who *did* engage in the mediation. And ETHICALLY it must be disclosed to people who did not engage in the mediation by any lawyer who did because he has the absolute duty to disclose to his clients anything he might have learned that could be of interest or assistance to them. (Nevada Supreme Court Rule 154(1), "A lawyer shall keep a client reasonably informed about the status of a matter…" and Rule 154 (2),

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.")

The exceptions in 8.3.1 closely track those found in confidentiality agreements providing for the protection of intellectual property when one party is going to disclose secrets to another. Under intellectual property law, intellectual property belonging to a person or company can be protected from disclosure or use except insofar as it is already in the public domain, has previously been learned from another source or has been previously disclosed without a confidentiality agreement. The purpose is to ensure that no secret that can actually be maintained as a secret will be disclosed, recognizing that some things might already be known and, hence, may be disclosed. But anything that is capable of protection is protected by such agreements. So it is here. Mediation participants can disclose anything that is already known, but may not disclose anything that is not. That means that the exceptions in 8.3.1 are meaningless since they refer only to things which are already not confidential.

WRID goes on to assert that, actually, there is an additional exception that allows for the disclosure of information to individual stakeholders through WRID, and it cites paragraph 8.3.4 as the authority for this proposition. Let's start with observing that if 8.3.4 were as broad as WRID is attempting to suggest, there would be nothing confidential that cannot disclosed. But that is clearly untrue. If it were true, why would the mediating parties be struggling so mightily to maintain the confidentiality clause? Simply stated, 8.3.4 is just not that broad. It allows WRID to reveal three things and three things only: (1) when the next meeting is; (2) what proposals are being considered; and (3) what work assignments have been handed out to the participants. That's not much information. And it certainly is not nearly as broad as WRID would have this court believe.

So, what impression has WRID tried to conjure here? First, that there are broad exceptions to the confidentiality prohibition and, second, that WRID can broadly disclose mediation information to its constituents. The impression is a false one. Neither impression, as we have seen, is true. The 8.3.1 exceptions are not exceptions at all but an accurate statement of law which is that anything that is already known cannot be made confidential by a confidentiality agreement. And the 8.3.4 exceptions are so narrow that nothing of substance can be disclosed under their terms. So, the question is: why has WRID labored so hard to convince this court that that the Paragraph 3 confidentiality section is not so onerous? Because if it can convince this court that pretty much anything arising from the mediation can be disclosed, it stands a reasonable chance of convincing it that maybe Mr. DePaoli does not have a conflict. But Paragraph 3 itself gives lie to that.

Having failed, by this time, to show that information arising from the mediation can be disclosed to non-mediating parties, WRID then engages in some slight of hand.

Well, they tell us, if no one can use the information at trial because it is not admissible, then everyone is on an equal footing anyway. Everyone is equally disadvantaged. But that is not so. Just because information is not admissible does not mean that it is not of interest and would not be helpful to a litigant. Many things in litigation are confidential. Attorney work product, for example. But would anyone seriously deny that knowing an opposing lawyer's work product, even though inadmissible, would be helpful to the other side? Would anyone seriously deny that that knowledge would represent a tremendous advantage to the opposing party? Of course not. The notion is absurd on its face. The reason attorney work product is protected from discovery is just because it would give the opposing party a tremendous and unfair advantage over his adversary.

And that is why the mere fact that the confidential information generated by the mediation process is inadmissible at trial does not, in any way, vitiate the tremendous advantage it gives those having it over those who do not. And how would an opposing party know to object to it when it is introduced anyway? How could he tell if it arose from the mediation or was just the result of good lawyering? He wouldn't. And that is why the fact of its inadmissibility is completely irrelevant.

And what of Mr. DePaoli in this situation? He will inevitably learn information he may not disclose to his non-mediating clients. If that were not anticipated, the mediating parties would not have gone to the trouble of including the confidentiality section in the *Order*. And when he learns that information, what is his duty to those of his clients who are not participating in the mediation? His duty is to disclose that information to them (Nevada Supreme Court Rule 154(1) and (2)) If he does not, he violates his duty to them under Nevada Supreme Court Rule 157(2) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client…"). But if he does disclose it to them, he violates this court's order and his duty to his mediating client. It would be difficult to imagine a greater or more obvious conflict of interest. And that is what this Court held in Duval Ranching Company v. Glickman, 930 F.Supp. 469,473 (1996). ("For example, an impermissible conflict of interest may arise because of a disagreement as to litigation strategy, or the fact that there may be substantially different possibilities for settlement among the clients and the third party…This impairment of a lawyer's loyalty may constitute a violation of the client's absolute right to her lawyer's undivided loyalty.")

It is worth noting, at this point, that although this Court is a very powerful one, it does not have the power to prevent a lawyer from carrying out his ethical duties to his client. The *Order*

does just that if a lawyer representing a party to the mediation also represents a party who is not. It prevents a lawyer representing both categories of party from carrying out his duty of loyalty to one of them on pain of violating this Court's order.

And what of Mr. DePaoli's non-mediating clients? They cannot, under the *Order*, even be told what Mr. DePaoli knows that might be helpful to them. They cannot even be given the tools through which they can determine their own best interests. They must trust that their lawyer is going to tell them everything he is bound by the Supreme Court Rules to tell them. But, of course, they have no way of knowing. They must take it completely on faith. That, itself, is an insurmountable conflict for Mr. DePaoli. It becomes even more insurmountable when the new Nevada Supreme Court ethics rules take effect on May 1st. According to the State Bar of Nevada website, the new rules will utilize the nomenclature of the ABA model rules and will also require that consent be "informed" consent. How can "informed" consent be obtained from ignorance of that to which the client is consenting? It is manifestly oxymoronic. And if Mr. DePaoli withholds information from his non-mediating clients so as to comply with the *Order* and protect WRID's confidence, he violates his ethical duty to his non-mediating clients. Zador Corporation v. Kwan (1995) 31 Cal.App.4th 1285, 1293 ("The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity – uberrima fides…Because of this fiduciary relationship, it is improper for an attorney to assume a position which is inconsistent with the interests of present or former clients.") In the instant case, Mr. DePaoli has a dual conflict. He cannot tell WRID anything his non-mediating clients tell him that might be of interest to it and cannot tell them anything arising from the mediation.

And what of Mr. DePaoli's mediating client? He cannot tell that client anything he learns in confidence from any non-mediating client even if it could very much strengthen WRID's hand in the mediation.

And what of the Landolts in this situation? Their situation is the worst of all. Mr. DePaoli has no duty to them. They do not need faith, of course, because they *know* Mr. DePaoli cannot tell them anything and that he has no ethical duty to do so. But they must assume that Mr. DePaoli will carry out his ethical duty to his non-mediating clients and will use, for their benefit, every bit of confidential information he learned in the mediation process. They must assume that he will disclose to his non-mediating clients every bit of confidential information he learned in the mediation process because that is his duty. And whether or not that information is admissible, it certainly can be presumed that it will be helpful in advancing the interests of the mediating parties and those non-mediating parties who are represented by Gordon DePaoli.

WRID goes on to make the entirely irrelevant statement that the mediating parties have not changed and "It is the District which is the Mediating Party, not its counsel" (Opposition, p.19) as if "the District", a fictitious inchoate entity, is the only one that will receive confidential information from the mediation, not its lawyer. Nothing could be more absurd. The district is represented by its lawyer. It participates in the mediation through its lawyer. The confidential mediation information it learns, it learns from its lawyer. And we do not know by what magical power, Mr. DePaoli can learn confidential information and remember it only when he is talking to someone entitled to have it. No, Mr. DePaoli knows what he knows, irrespective of who he is, at the moment, representing. And he is bound to use it in behalf of any person or entity he is representing who could be helped by that information.

Finally, Nevada Supreme Court Rule 157 (2) requires that a lawyer representing multiple parties in any litigation obtain the consent of each, preferably in writing, after consultation which "shall include explanation of the implications of the common representation and the advantages and risks involved." There is no evidence before this Court that that has done this in this instance. If for no other reason, the instant motion should be granted on this basis.

**Standing**.

It is odd that WRID has raised the issue of standing, particularly by reference to Colyer v. Smith 50 F.Supp. 966 (1999). After going to some effort to convince this court that *Colyer* proceeds from the assumption that no one who is not either a client or former client of an attorney with an obvious conflict has standing to challenge his representation in a particular case, WRID discloses that the *Colyer* court provides an exception to the general rule. That exception is "where the ethical breach so infects the litigation that it impacts the moving party's interest in a just and lawful determination of her claims". (Id at 971-972) ("Where the ethical breach is so severe that it 'obstructs the orderly administration of justice' the party who finds his claims obstructed has standing.") It is just so here.

Mr. DePaoli has as clear and obvious a conflict as can be imagined. That is an ethical breach. (Nevada Supreme Court Rules 157 (1) and (2)) By participating, for some clients, in a mediation from which others of his clients are excluded, he will learn confidential information that he is prevented, by the Order, from disclosing to his non-mediating clients. That includes those of his clients who are not participating in the mediation. But Nevada Supreme Court Rule 154(1) and (2) requires that he disclose to clients under his representation all information that might be of interest or of help to them in the litigation. If he fails to do so, he violates Rule 154. If he does do so, he violates this court's order. It is an untenable position for him and

presents him with a conflict as plain as ever existed. Conflicts are ethical violations. (Nevada Supreme Court Rules 157 (1) and (2)) Failing to make disclosures one is bound to make are ethical violations as violations of the duty of loyalty. That demonstrates the first prong of the *Colyer* test.

Once Mr. DePaoli learns the many confidential matters to which he will be (or has been) exposed in the mediation process, he will not be able to unlearn them. They will be there, the fruits of his untenable conflict, as he prepares his representation of his mediating and non-mediating clients, alike. And it will affect what he does and how he prepares his case. At the same time, those representing the non-mediating, non-DePaoli parties will be left with preparing without the benefit of all that knowledge Mr. DePaoli has learned as a result of his participation in the mediation. His multiple ethical breaches will, in fact, so infect the litigation process, that it will presumptively adversely impact the Landolt's interest in a just and lawful determination of their rights in this litigation. There is no way to escape it. And that satisfies the second prong of the *Colyer* case for establishing standing. The Landolt's clearly have standing to bring the instant motion.

While WRID suggests that claims of conflict are merely speculative, they are much, much more. WRID claims that we do not know what information Mr. DePaoli will learn; whether it is confidential; what impact it might have on the conduct and preparation of a defense and whether or not he will disclose it to his non-mediating clients. Of course, we don't. *It's confidential*! And that is the very point. We don't know and we cannot know because of the confidentiality section of the *Order*; the *Order* that gives Mr. DePaoli his conflict. We don't know how it will impact us; we can't know whether it would be helpful in framing a defense; we don't know if he will disclose it to his non-mediating clients. Even his non-mediating clients

cannot know, with confidence, whether or not he is telling them everything they might need to know in framing their defense. But none of that makes the Landolt's complaint herein speculative. There is nothing speculative about the conflict itself. And it must be presumed that Mr. DePaoli will be exposed to confidential information, else why have a confidentiality clause? We do know that it will be information bearing on the rights and duties of the various parties impacting the adjudication of water rights in the instant action. And we do know that Mr. DePaoli has a duty to disclose any information he has that would be helpful to any client. And we do know that Mr. DePaoli's duty to his mediating client is to keep such information from his other clients, who have a right to have it. So, there is nothing speculative about the *conflict* unless it is claimed that there will be no confidential information exchanged during the mediation process. And if that is true, then we can dispense with the confidentiality clause and release all information arising from the mediation to all parties. But that has not yet been done.

Inasmuch as the Landolts' complaint herein is being dismissed as speculative, though, let's make it concrete by speculating a bit. Suppose the mediating parties learn that a settlement is imminent and that it will mean a loss of some of their existing water rights. Obviously, that would mean a decline in the value of those existing water rights. Armed with such inside information, the mediating parties could sell off their water rights before the decline. Further, without disclosing the confidential information, Mr. DePaoli could alert his non-mediating clients to sell off water rights before they take a tumble in the marketplace. There are no Wall Street style insider information laws applicable to the sale of water rights. Or we can "speculate" as Judge Reed did in *Duval Ranching*, supra, when he wrote: "...an impermissible conflict may arise because of a disagreement in strategy or the fact that there may be substantially different possibilities for settlement among the clients and a third party..." Id, at 473. One can speculate

like this *ad infinitem* to illustrate the potential inequity presented by the confidentiality clause and this conflict of interest problem.

There are solutions to this problem, among which are getting rid of the confidentiality clause or creating some body to represent the diverse interests of stakeholders and giving them a seat at the mediation table. But those do not exist at this point – in fact, they have been actively resisted - and even if they did exist, they would not vitiate Mr. DePaoli's current severe conflict.

At page 21 of its brief, WRID attempts to minimize the impact of the confidentiality clause on the non-DePaoli parties by indicating that whatever defenses exist to the claims of the government and the Tribe, they are shared equally. It is all well and good for the repository of confidential information to reassure us all that it does not make any difference to us. It is quite another thing to be the party who lacks that information to have confidence it is true. We suppose it would be theoretically possible to convince someone that knowledge of an opponent's confidential attorney work product in preparation for trial would be of no earthly use to the other side, but it is not likely. The problem with the situation as it exists in this case, is that we do not know what we do not know and, thus, cannot gauge how helpful or unhelpful it would be. That is the crux of the conflict as it affects the Landolts. Who knows what information will be generated by the mediation that could be helpful to some, but not all, of the non-mediating parties? The problem is ***we do not know***.

WIRD goes on to say that if an equitable defense exists, it exists for all parties. (Opposition, p.21) Well and good. But if we do not know of it, we might not timely assert it. If we do not have knowledge of the facts necessary to prove it, we might not be able to timely generate the evidence necessary to demonstrate it at trial. Unless Mr. DePaoli is going to take responsibility for proving every stakeholder's equitable defenses, his advance knowledge of

them or information arising from the mediation that would tend to support them, would put the non-DePaoli stakeholders at a tremendous disadvantage.

WRID next contends (Opposition, p.21) that the court's decision recognizing a new water right for the Tribe will impact all other users equally. But that is not true. There are several categories of users who may be treated differently, such as agricultural users, government users and individual well owners. When the mediation is between the Tribe and the various governments, it is pretty clear that the governments will protect their own interests before those of individual stakeholders and information might arise in the mediation that impairs the governments' claims to the benefit of individual stakeholders. So it is not true that a decision granting the Tribe the relief it seeks will necessarily impact all parties equally. And we do not know what information will be exchanged during the mediation process that could help those individual stakeholders in framing their defense.

There is also, of course, the matter of settlement or capitulation which may proceed on a more individual basis. A greater understanding of facts, background and rights might impact the decision an individual stakeholder might make with respect to his willingness to maintain a position in the instant litigation. But if his lawyer is not willing to tell him the facts that could be critical in helping him make that decision, he will not have the tools to make a sound one.

We are operating in a vacuum. First, as pointed out in WRID's opposition, we do not yet know what threshold issues will need to be determined by the court. Second, we have no idea, therefore, what issues the court will have to decide to finally decide the Tribe's claims. Because we do not know what the threshold issues or the final issues will be, we do not know what defenses are available to us. Because we do not know any of these things, we do not know what evidence we will need to sustain any such defense. Finally, because we do not know what

evidence we will need to defend ourselves, we cannot gauge whether or not information that will be developed during the mediation process will assist us. That is the problem.

But what we *do* know is that confidential information will be generated by the mediation and that Mr. DePaoli will know it and be unable to share it with his non-mediating clients. The nature and extent of that information is unknown to us, at this point, but we must assume it will exist since the mediating parties took such pains to included a remarkable paragraph that, in six sentences said over and over again that such information was to be held confidential and unavailable to any but the mediating parties. Unless we know what that information is, we cannot know whether or not if would be helpful in framing a defense for the non-mediating parties, but we cannot just take it on faith that it will not.

On the issue of the Landolts' standing to move for the disqualification of Mr. DePaoli and his firm, then, the case cited by WRID is very clear. If an ethical violation occurs that has the effect of impairing a party's right to a fair trial, that party has standing to bring a motion to disqualify.

So, what do we know? (1) Mr. DePaoli represents parties to the mediation. (2) Those parties and Mr. DePaoli will be exposed to information that could be of assistance to other parties to the litigation. (3) Mr. DePaoli is prohibited by this court's order from disclosing any of that information to any parties to the litigation who are not, also, participating in the mediation. (4) Mr. DePaoli also represents parties to the litigation who are not participating in the mediation. (5) Mr. DePaoli has a duty to disclose to those parties anything he learns from any source that would be helpful to them in the litigation or in which they might be interested. (6) Therefore, Mr. DePaoli is in an unethical conflict. (7) Inasmuch as the mediation has been going on for more than two long years, it defies logic to believe that some such information has

not already been generated by the mediation. Otherwise, surely, the mediating parties would not have gone to such lengths not only to keep information regarding the mediation from the other litigants, but they would also not so mightily have resisted the inclusion of other parties in the process. Surely, they would not have been secretive even with this court, when it inquired about the mediation at the status conference on October 1, 2004 (8) Mr. DePaoli's unethical conflict has an adverse impact on those litigants who are not represented by him because they will not have the benefit of the knowledge he gains from the mediation while those he represents will or will at least be warned off of unwise decisions based on his insider information. (9) That will clearly result in a disadvantage to the non-DePaoli litigants in participating in and preparing for trial. Under the *Colyer* case, then, WRID's own authority, Mr. DePaoli must be disqualified and the Landolt have standing to move for that disqualification.

**MR. DEPAOLI MUST BE DISQUALIFIED**

In opposing the instant motion, WRID suggests that the court must engage in some sort of balancing between parties' choice of lawyers and a conflict. (*Opposition*, p.22) The fact is that if a court finds that a conflict exists that threatens an injustice, it must disqualify the offending lawyer. Tessier v. Plastic Surgery Specialists, Inc. 731 F.Supp. 724 (1990) ("Chief among the reasons for avoiding conflicts of interest is the preservation of the public's confidence in the integrity of lawyers and the judicial system. To allow a conflict to remain unaddressed until an affected party complains about the quality of justice he or she has received is to betray the public trust granted to the bar as a self-regulating organization.") *Id*, at 729. In disqualifying counsel in that case, the court held that any lawyer involved in the litigation has standing to bring the motion for the purpose of protecting the integrity of the process. The right to retain counsel

of a client's choosing, it wrote, is secondary in importance to the court's maintaining the highest ethical standards and to preserve trust in the integrity of the bar. *Id.*

WRID goes on to imply that the instant motion presents only a theoretical conflict. However, the conflict, as we have pointed out hereinabove, is as clear, existing and real as can be possible. Mr. DePaoli will learn facts that would be of interest to his non-mediating clients. In order to carry out his duty of confidentiality to his mediating clients, he cannot reveal those facts to his non-mediating clients. In order to carry out his duty of loyalty to his non-mediating clients, he must reveal those facts to them. His conflict is direct: he has a duty to one client in this case that conflicts with his duty to another client in this case. He cannot disclose to one what he learns in representing the other. It is a conflict, plain and simple. It is not theoretical. It is not a mere "possibility".

WRID indicates that Nevada has a two-pronged test for evaluating disqualification motions. The first prong is that there is "at least a reasonable *possibility*" that an impropriety did occur. Not a probability. Not a certainty. A *possibility*. That prong is satisfied by the fact that the mediating parties have engaged in the process for more than two years and vigorously defended their right to keep confidential information derived through that process. If the information they seek to keep confidential would not be of interest to the non-mediating parties, why keep it confidential? The right to keep some information confidential exists so that someone with a right to certain information that could give those from whom the information is withheld an unfair advantage, can keep it from them. If it would give them no advantage, what basis is there to keep it from them? Because we are not privy to the confidential information, we cannot tell this court what it is. But we must assume that it has arisen and that it is something in which the non-mediating parties would be interested. With that assumption in mind, we know

that either Mr. DePaoli disclosed it to his non-mediating clients, in which case, he violated his duty to his mediating clients, or he did not reveal it to his non-mediating clients, in which case he has violated his duty to his non-mediating clients. In either event, there is at least a reasonable possibility that an impropriety has occurred. Keep in mind, that the rule does not require that we demonstrate that an impropriety did, in fact, occur. Nor does it require that we prove that there is a probability that it occurred. We must show only that there is a reasonable *possibility* that it occurred, and no fair-minded person can deny we have done that.

The second prong is that there is a likelihood of public obloquy that outweighs the parties' desire to be represented by a particular lawyer. There is more than a likelihood of public obloquy in this instance. There is every possibility that whatever this court ultimately does can be undone if a real conflict is shown. This case will resolve an important matter of urgent public concern. Its failure as a result of a conflict would be a major public issue. The public would rightly be critical if the process were to fail when the means of protecting it are so simple. There is no reason to invite criticism when the problem can be solved early in the process.

WRID contends that Mr. DePaoli's representation of it in this case is not "directly adverse" to his other clients. But WRID has too restrictive a definition of what is "directly adverse". It does not necessarily mean that the parties have to be on opposite sides of a case, only that an interest of one party is preferred over the interest of another. In this case, WRID's interest is in maintaining confidentiality and Mr. DePaoli's non-mediating clients' interest is in having access to the confidential information derived from the mediation. Their interests are directly adverse in this regard. As WRID has pointed out in its opposition, "Direct adversity exists when an attorney acts as an advocate for one client against another client." (*Opposition*, p. 24) That has occurred in this case. Either Mr. DePaoli has disclosed confidential information to

those of his clients unentitled to have it, or he has not. Either way, he has acted for one client's interests over another's.

Perhaps the conflict could be overcome with a knowing and intelligent waiver of the conflict, as WRID has suggested, but Mr. DePaoli's non-mediating clients cannot give one because they cannot have disclosed to them the information that would make their waiver "knowing" and, thus, "intelligent". So, contrary to WRID's hopeful idea, the problem cannot be solved by agreement. And, as pointed out hereinbefore, it has not been so solved.

**Water Law Argument**

WRID argues that water law cases are different and that there is, therefore, no conflict since whatever the court's ultimate decision, all stakeholders will be affected equally. That position misapprehends several things. The first, and most obvious, is the fact that it is not the ultimate interests that are necessarily in conflict, but the fact that Mr. DePaoli must withhold from some of his clients information that he must give to other of his clients. Whether their interests will ultimately conflict on the end merits of the case, we cannot, yet, know. And it is likely that we will never be able to know because we will never be exposed to the confidential information generated by the mediation that we are prohibited from learning. We do not know if that information would be helpful, because we do not know what it is. We must assume it would be helpful, otherwise, there would be no reason to keep it secret. But what we do know is that Mr. DePaoli must prefer some clients over other clients. And that is the conflict.

In addition, there are different categories of individual stakeholders and it is not true that a decision in favor of the Tribe will necessarily affect all individual stakeholders equally. The court could reapportion water resources as between all stakeholders by formulas that have not yet been proposed. Since the Tribe's immediate effort is to modify the 1936 Decree, it is certainly

possible that such a modification could involve a complete reallocation of resources and changes for categories of users to the detriment of others. While it has not yet been discussed, once the Decree is opened up for change, there seems no principled reason to exclude the possibility that anything in it might be fair game. So, it does not matter that the instant case involves water law. The Court can fashion a decision that will favor some and not others so its decision might not apply to all equally.

**Mr. DePaoli's Representation WRID Impacts His Responsibilities to His Individual Clients.**

Finally, the best argument in favor of disqualification is contained in the final section of the opposition brief. In it, WRID points out that paragraph 2 of Nevada Supreme Court Rule 157 prohibits a lawyer from a representation if it will materially limit that lawyer's responsibilities to another client. WRID goes on to posit that "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest." It is just so, in this case. Mr. DePaoli cannot disclose to his individual clients what he is bound to disclose to WRID even though he has a duty to do so. He has a clear conflict and must be disqualified.

## CONCLUSION

The Landolt's motion is profoundly simple. WRID's opposition appears designed to so complicate the matter that the simplicity of the issue will be obscured. But it never actually addresses the conflict the Landolts have raised. Mr. DePaoli is engaged in the representation of a client whose secrets he is bound to keep. He is engaged in a mediation process that has resulted or will result in his receipt of information that might be of interest to his non-mediating clients. He is bound by State Supreme Court Rule to disclose all such information to his non-mediating

clients and prohibited from doing so by this court's order. He is in an untenable conflict. If this process is to succeed, there must be no possible suggestion that it is in any way tainted. Court processes, no less than lawyers, must avoid the appearance of impropriety. Mr. DePaoli and his firm should be disqualified from further representation of any of the parties hereto.

Dated: February 20, 2006

*/s/ John W. Howard*
John W. Howard
Attorney for Landolts

## CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2006, I electronically filed the foregoing REPLY TO OPPOSITION TO MOTION TO DISQUALIFY COUNSEL, GORDON DePAOLI with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their e-mail addresses:

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and I further certify that I served a copy of the foregoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 21st day of February, 2006:

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*/s/ Elisa Marino*

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